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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-88

ROBERT R. PHILLIPS, Individually and on Behalf of Each and All Others Similarly Situated, *et al.*, *Petitioners*,

v.

E. T. KLASSEN, Individually and in His Official Capacity as Postmaster General of the United States Postal Service, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM R. DUFF
1709 New York Avenue, N.W.
Washington, D.C. 20006

IVAN FRANK KARDOS
Post Office Box 1048
Roswell, New Mexico 88201

Attorneys for Petitioners

August 7, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Robert R. Phillips, Mary A. Karwoski, Ira S. Greinsky, Ann Putney Flory and Birger F. Burman, individually and on behalf of each and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District

of Columbia Circuit entered in this proceeding on May 10, 1974.[1]

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, as does the District Court order appealed from. No opinion was rendered by the District Court for the District of Columbia. The decision of the United States Civil Service Commission Board of Appeals and Review In the Matter of Ira S. Greinsky, one of Petitioners, also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered May 10, 1974. This petition for a writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Service Commission was authorized by law to promulgate the regulation under which named Petitioners and others similarly situated retired from the U.S. Post Office Department between May 16 and June 15, 1971, and whether required procedures were followed in implementing the regulation.

2. Whether exhaustion of administrative remedies by persons seeking judicial review is required where the issues sought to be reviewed have already been

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[1] Respondents in this proceeding, appellees below, are E. T. Klassen, Robert E. Hampton, Jayne B. Spain, and L. J. Andolsek, individually and in their official capacities, and the United States Postal Service. Robert E. Hampton is Chairman of the United States Civil Service Commission, and Jayne B. Spain and L. J. Andolsek are the other two Commissioners.

finally adjudicated by the administrative body and further administrative appeals would be fruitless.

3. Whether a suit brought on behalf of over 1500 former U.S. Post Office Department employees alleging invalidity and coerciveness of the regulations and procedures under which their retirements were effected may be certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C., Federal Rules of Civil Procedure, Rule 23; 5 U.S.C. § 8336 (1970) and § 8336 (d) (as amended, 1973); Federal Personnel Manual Supplement 831-1, Subchapter S11-d (2) (1970); 5 C.F.R., ch. 1, pt. 351 (1973). Pertinent parts of texts of statutory provisions are reproduced in Appendix.

STATEMENT OF THE CASE

This case arose from personnel actions incident to the 1971 reorganization of the United States Post Office Department into an independent executive agency, the United States Postal Service. The jurisdiction of the district court was invoked following the exhaustion of administrative remedies by petitioner Greinsky and pursuant to the court's statutory authority to afford equitable relief and render monetary judgments in cases involving laws and regulations governing federal employment.

Headquarters and regional employees were first informed of certain of the details of the proposed reorganization in a memorandum from the Postmaster General dated May 12, 1971. In that memorandum, it was stated that the number of postal regions would be decreased, authority and management responsibility would be decentralized, and headquarters and regional

staff complements would be reduced. The message also announced the "liberalization" of retirement policies, and a one-time bonus offer designed to induce older postal employees to retire. The following day, the Postmaster General further elucidated the retirement announcement in a national teleconference and a supplementary memorandum, to which was appended a resignation form.

The retirement inducement offered those who retired between May 16 and June 15, 1971, a bonus equal to six months' salary in addition to the 4.5 percent cost-of-living increase previously authorized by the Civil Service Commission for all federal employees retiring prior to May 31. In addition, resignations were to be treated as "involuntary separations" for purposes of liberalizing age and service requirements for annuity eligibility. Ordinarily, in order to qualify for an annuity, a federal employee must be 55 years of age with 30 years of service, 60 years of age with 20 years of service, or 62 years of age with 5 years of service. 5 U.S.C. § 8336 (Appendix 21a). However, reduced annuities were available under 5 U.S.C. § 8336 (d) in cases of "involuntary" separation, except for cause, of employees who are 50 years of age with 20 years of service or who have completed 25 years of service. The informal application of this section to "voluntary" resignations submitted in anticipation of a reduction in force was formally approved by the Civil Service Commission in 1969, in Federal Personnel Manual Letter No. 831-23, subsequently codified as FPM Supplement 831-1, Subchapter S11-d (2) (Appendix 22a).

The implied threat to employees was that, unless they accepted the retirement offer, they would be subject to dismissal through a reduction in force in which standard civil service procedures would be followed. Thus,

"eligible" employees were granted, in effect, 18 days in which to resign if they were to receive the bonus, the cost-of-living increase, and the annuity. Although FPM Letter No. 831-23 required that each person requested to resign in contemplation of a reduction in force must be fully informed of his retention rights, eligible employees were not informed of these rights. Nor were they given access to retention registers during the period in which they had to decide whether to accede to the inducements to retire or risk separation later without the liberalized benefits.

The Postmaster General's carrot and stick approach was successful. By June 15, 1971, 1,884 of the 2,740 employees eligible for the bonus and annuity, including the five named Petitioners herein, had retired.

Petitioner Greinsky retired from the United States Post Office Department on May 31, 1971. On June 9, 1971, he wrote the New York Regional Office of the Civil Service Commission, complaining that he had never been informed of his retention rights by the Department and that his resignation was involuntary and coerced. His complaint was rejected by a Civil Service Appeals Examiner June 29, 1971. He appealed this ruling to the Civil Service Commission Board of Appeals and Review, which on October 18, 1971, issued a decision upholding the finding of the Appeals Examiner (Appendix 16a).

Thereafter, on June 14, 1972, suit was filed in the United States District Court for the District of Columbia by the five Petitioners herein, each representing a different age and service classification, on behalf of themselves and all others similarly situated. The suit charged that they had been unlawfully removed from

their positions because the Civil Service Commission was without authority to promulgate Subchapter S11-d (2); that even if the regulation were valid, the Postal Service failed to comply with its requirements; and that their retirements were coerced as a matter of law. A motion for certification of class action was also filed. Respondents, defendants in District Court, filed a motion for summary judgment with regard to Greinsky and a motion to dismiss with regard to the other named plaintiffs and opposed certification of the class action. Petitioners filed a cross-motion for summary judgment. On October 6, 1972, the District Court granted respondents' motions in an order denying certification of the class action, granting summary judgment with regard to Greinsky and dismissing the action with regard to the other named plaintiffs (Appendix 15a).

A timely appeal followed to the Court of Appeals for the District of Columbia Circuit, which on May 10, 1974, affirmed the District Court's order (Appendix 1a). The decision of the Court of Appeals reiterated the chronology leading up to the appeal, implicitly confirming the legality of the retirement procedure. The denial of class action certification was upheld on the basis that the named plaintiffs were not truly representative of the interests of the defined class. Summary judgment as to Greinsky was affirmed because the court found the record to be supportive of the Civil Service Commission's disposition of the case. The dismissal of the action as to the other named plaintiffs was upheld because of failure to exhaust administrative remedies and the impracticability of the remedy sought.

In the interim, the regulation authorizing application of 5 U.S.C. § 8336 (d) to requested resignations in an-

ticipation of a reduction in force was rescinded, effective January 1, 1973. Subsequently, on June 12, 1973, the President signed into law Public Law 93-39, amending § 8336 (d) specifically to allow reduced annuities to be paid to those in the 50 years of age/20 years of service and 25 years of service categories in certain reduction-in-force situations. Thus statutory authority was provided for the kind of procedure utilized in the Post Office Department's retirement offer originally made two years earlier.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in the instant cause:

1. Presents squarely the issue of the proper interpretation of the statutory powers of the Civil Service Commission and federal agencies in cases involving federal reduction in force, which issue is of such importance to the fulfillment by such agencies of their duty to protect the federal civil service system as to merit review and resolution by this Court;

2. Is in conflict in principle with the decision of the Court of Appeals for the Tenth Circuit in *Barela* v. *United Nuclear Corp.*, 462 F.2d 149 (1972) and the Court of Appeals for the Fifth Circuit in *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (1968);

3. Erroneously interprets Rule 23 of the Federal Rules of Civil Procedure governing class actions to permit a District Court to refuse to certify an action as a class action if there is the potential that there will be divergent views among the class and the possibility that the devising of an appropriate remedy will be complex; and

4. Denies Petitioners due process of law.

I. THE CIVIL SERVICE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN PROMULGATING THE DISPUTED REGULATION RELATING TO REDUCTIONS IN FORCE AND ERRED IN ITS REVIEW OF THE IMPLEMENTATION OF THE REGULATION BY THE POST OFFICE DEPARTMENT.

The regulation authorizing the retirement proposal made by the Post Office Department was for three years codified as Federal Personnel Manual Supplement 831-1, Subchapter S11-d (2). The subchapter—which was without statutory sanction—purported to allow "voluntary" resignations submitted upon request in contemplation of a reduction in force to be considered "involuntary" within the meaning of 5 U.S.C. § 8336 (d), which provides reduced annuities to those involuntarily separated who ordinarily would not meet standard age and service requirements for annuity eligibility (Appendix 21a). In short, the Civil Service Commission rewrote the statute and expanded its scope by promulgating the very regulation later utilized by the Post Office Department to cause the Petitioners to retire. Subsequently, effective January 1, 1973, the Commission, without explanation, rescinded the regulation. Thereafter, Congress amended 5 U.S.C. § 8336 (d) to incorporate in the statute voluntary resignations submitted in contemplation of a reduction in force (Appendix 22a). In the interim between the promulgation of the regulation and its rescission, Petitioners, spurred by the patent threat presented them by the Post Office Department and denied access to the kind of information which would have enabled them to weigh alternatives, chose to accept the Department's offer as the lesser harm.

The Post Office Department, for its part, did not even bother to adhere to the requirements of the subchapter in implementing the retirement proposal. Ac-

cording to the subchapter, competitive areas were required to be designated when resignations were requested in anticipation of a reduction in force. Each employee whose resignation was requested had to be "fully informed of his retention rights under the reduction-in-force regulations". In fact, however, competitive areas were not established and retention registers were not prepared—and both, under 5 C.F.R. § 351.402 to 404, are mandatory when reductions in force are instituted by federal agencies—until after the retirement offer had expired.

What on the surface appeared to be a proposal benefiting eligible employees was, in fact, a means of coercing retirement of civil servants who were never given the opportunity to weigh the risks with which they were confronted. The statute was flouted. The vaunted protection afforded federal employees was demonstrated more in the omission than in the observance. The issue has a broader implication than its effect on the relatively small class of postal employees who were coerced into resignation in May and June of 1971. The mode of its disposition by the Court below poses a threat to the employment security of all federal employees. Executive reorganizations and reductions in the work force employed by federal agencies are inevitable from time to time. The Civil Service Commission, not less than other federal agencies, should be required to safeguard the hard-won employment protection built into the federal civil service system.

Part and parcel of the Civil Service's attitude regarding the post office reorganization was its perfunctory and superficial examination of the appeal of Petitioner Greinsky. It fully investigated neither the legality of the procedure, nor its implementation, nor its

application to Greinsky's case. Rather than examining whether coercion was involved in the retirement proposal as announced by the Postmaster General, the Board of Appeals and Review of the Commission accepted as conclusive the statement in the announcement that no coercion was intended by the action. As evidence of the voluntariness of Greinsky's retirement, the Board noted that he "voluntarily" sought information concerning his annuity eligibility. Neither of these facts proves or even tends to prove the proposition it is cited to support. Similarly, the Board attempted to buttress its decision with the unexceptionable statement that a retirement action is "voluntary" if the employee understands the transaction, has freedom of choice, is given a reasonable time to make his choice, and is permitted to set the effective date of his retirement." The implication is that these factors were present when Greinsky resigned; in fact, none was. Although he sought information concerning his annuity, he was denied access to retention registers and to information that would have enabled him to intelligently assess his chances of continued employment. Greinsky was informed that his current job would be abolished but was not informed of any other employment options which might be available to him in the reorganized Postal Service. The "freedom of choice" offered him was to resign and receive his bonus, or to stay at unknowable risk. The time within which he had to decide —18 days if he were to receive maximum benefits— was meaningless in the absence of information upon which he could have based an informed decision. By the same token, the Board's suggestion that Greinsky was permitted to set the effective date of his retirement callously turns upside down the reasons for which Greinsky chose to resign by a date certain.

Nor did the Board conduct a critical examination of the implementation of the retirement offer. Had it done so, it would have found that the Post Office Department had not complied with procedures mandated by the subchapter, including the critical requirement that employees be fully informed of their retention rights. The faulty conclusions and the failure of the Commission to fully investigate Greinsky's claims rendered the decision irrational, arbitrary and capricious. More than that, they led to the summary judgment by the District Court, the determination by the Court of Appeals that both the Board and the District Court acted properly, and the imminent risk that the rights of federal employees to reasonably secure employment will be vitiated.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE ISSUE OF WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NECESSARY WHERE SUCH EXHAUSTION WOULD BE FRUITLESS.

The Court below upheld the District Court's dismissal of the action as to all of the Petitioners except Greinsky on the ground that they failed to exhaust their administrative remedies—i.e., failed to appeal to the Post Office Department or the Civil Service Commission. This holding is in conflict with the holding of two other United States Courts of Appeals. These have held that exhaustion is not necessary in cases in which the issues common to a class or to co-plaintiffs have been finally adjudicated by an administrative body in a single case. Indeed, the cases cited by the Court below to support its position in actuality stand for the proposition that in cases in which one person has exhausted his remedies, and it would be fruitless for others to do so, all nonexhausting persons similarly situated may

be joined in a class action: *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Barela* v. *United Nuclear Corp.*, 462 F.2d 149 (10th Cir. 1972). While these are employment discrimination cases and the administrative agency involved is the Equal Employment Opportunity Commission, the principle stated in *Oatis* that "[it] would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints . . ." is necessarily equally valid for civil service cases. 398 F.2d at 498.

The Court below did attempt to distinguish the Greinsky appeal, reasoning that the issues in his case were peculiar to him, and from this that the other Petitioners had slept on their rights. In fact, however, the allegation of coercion in Greinsky's complaints to the Civil Service Commission was based on the terms of the retirement offer, the short period of time in which to make the decision whether or not to retire, and the denial of access to retention registers, all facts common to the named Petitioners and the class they seek to represent. That additional facts suggesting coercion were present in the Greinsky case is irrelevant, since his claim was rejected in its entirety.

The real basis for the Court's insistence on the obligation of all of the Petitioners to have exhausted their administrative remedies is perhaps to be found in its statement that its "obligation to insist on the exhaustion doctrine is underscored" by the magnitude of the relief sought—a "sweeping ouster and reinstatement program." According to the decision, courts "must give consideration to the public interest and inconvenience." The Court below has apparently reasoned that the public interest lies in minimizing disruption;

actually the public interest lies in ascertaining what is right, fair, and equitable. As this Court has recently noted, "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say . . . that [constitutional rights] were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972).

III. THE CLASS ACTION SHOULD HAVE BEEN CERTIFIED PURSUANT TO THE USUAL INTERPRETATION OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Court of Appeals upheld the District Court's refusal to certify the class action on the twin theories that there was a "likelihood" of "divergent views" among the class sought to be represented by the named Petitioners and an equal likelihood that the remedy sought was potentially complex. As noted above, administrative inconvenience should not, by itself, provide any basis for rejecting Petitioners' appeal. Furthermore, the emphasis upon the remedy sought in the opinion below seems premature, in that the effect of the decision is to block access to the courts, thereby foreclosing a hearing on the merits.

The purported class herein meets Rule 23's threshold requirements of impracticability of joinder, existence of common questions, typicality of claims of representative plaintiffs, and adequacy of protection of class interests (Appendix 20a). As to the possibility stressed by the Court below that there may be divergent views among the defined class, class actions normally are not rendered impermissible by the fact that the identity of

interests is not absolute or that particular questions remain to be resolved with regard to individual class members after the common questions of law and fact have been disposed of: *Esplin* v. *Hirschi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969); *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F.2d 909 (9th Cir. 1964). The one essential requirement is that the common legal and factual questions predominate over questions peculiar to individuals, and that test is met in this case. Rule 23(b)(3).

In support of its theory that a class action may not be maintained when the interests of the members in the remedy sought may differ, the Court below relies on *Dierks* v. *Thompson,* 414 F.2d 453 (1st Cir. 1969). But in that case the court expressly did not reach the question of whether or not a class action might be maintained in the instance of a class limited by definition to those who agreed with the relief sought. *Id.* at 456-57. Furthermore, the court upheld the propriety of the class action for the reason that, while the representative plaintiffs were determined not to fairly represent all members of the specified class of employees, it nevertheless remained true that "any whom they do not represent are represented by defendants." *Id.* at 457. Similarly, in this action, any members of the class sought to be represented who would prefer continued retirement to reinstatement may be said to be represented by the defendants (respondents). Furthermore, the Court may allow redelineation of the class as appropriate under Rule 23 (c) (4), and prospective class members may "opt out," under Rule 23 (c) (2), from any relief subsequently granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

WILLIAM R. DUFF
1709 New York Avenue, N.W.
Washington, D.C. 20006

IVAN FRANK KARDOS
Post Office Box 1048
Roswell, New Mexico 88201

Attorneys for Petitioners

August 7, 1974